

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1485

To be argued by
KENNETH V. HANDAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1485

UNITED STATES OF AMERICA,

Appellee

—v.—

VINCENT BROWN and GEORGE NICHOLAS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

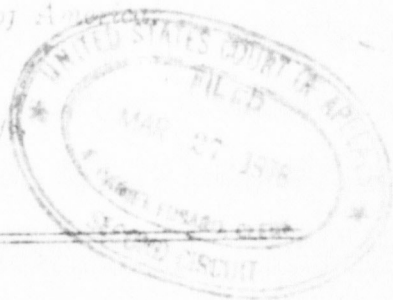
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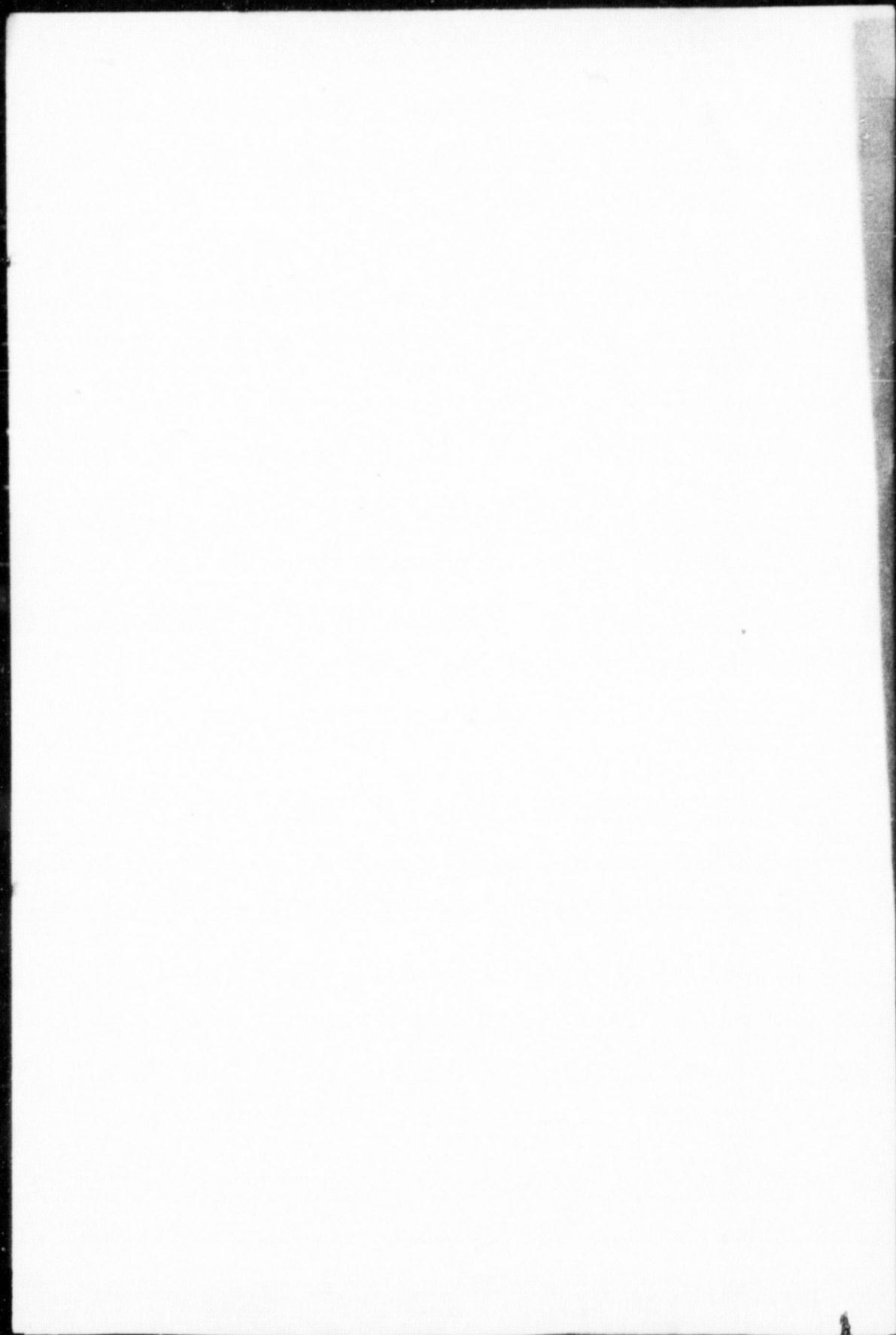


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1485

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT BROWN and GEORGE NICHOLAS,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vincent Brown and George Nicholas appeal from judgments of conviction entered on November 3, 1977 and October 21, 1977, respectively, in the United States District Court for the Southern District of New York, after pleas of guilty before the Honorable Charles E. Stewart, United States District Judge.*

Indictment 73 Cr. 731, filed on July 25, 1973, charged Brown and Nicholas in one count with possession of counterfeit Federal Reserve Notes, in violation of Title

* The defendants pled guilty subject to the express condition that they be allowed to preserve for appeal the denial of their pretrial motions. This procedure has been approved by this Court. *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States v. Faruolo*, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

18, United States Code, Sections 472 and 2. Hearings on the defendants' pretrial motions commenced on September 6, 1977, and concluded after four days of testimony on September 19, 1977. Judge Stewart denied all of the defendants' motions, and on September 20, 1977 each defendant pled guilty to the single count of the Indictment.

Judge Stewart sentenced Nicholas to three years imprisonment on October 21, 1977, and on November 3, 1977, he sentenced Brown to three years imprisonment. Nicholas is presently incarcerated at the Federal Penitentiary, Lewisburg, Pennsylvania; Brown is at liberty on bail pending this appeal.

Statement of Facts

A. Synopsis

On May 1, 1973, Brown and Nicholas were arrested by New York City Police for possession of a stolen automobile. During an inventory search of the automobile, fifty counterfeit \$20 Federal Reserve Notes were found in a shaving kit on the right front floor of the car. Subsequently, Brown and Nicholas made complete admissions concerning the counterfeit money. After becoming fugitives for almost four years, Brown and Nicholas were arrested separately in mid-1977.

Brown and Nicholas moved to suppress the physical evidence seized and any incriminating statements made by them on the grounds that there was no probable cause for the arrest by the New York City Police and that they were not informed properly of their constitutional rights prior to questioning. They also sought dismissal of the indictment, or, alternatively, suppression of their statements, on the ground that they had been informed

by federal authorities that they would not be prosecuted if they cooperated with the authorities. Finally, Brown and Nicholas moved for dismissal of the indictment for failure of the Government to provide them with a speedy trial. Following a suppression hearing, the District Court denied each motion.

B. The Government's Case at the Suppression Hearing

On May 1, 1973, police officers Frank Kollmann, Patrick Santeli and Smith of the Auto Crime Unit of the New York City Police Department while on duty saw a 1969 Lincoln Continental bearing Rhode Island license plates BH-266 parked on West 74th Street between Amsterdam Avenue and Broadway. There was no one in the car. (Tr. 7-9, 338-39).*

The officers were attracted initially to the car because it had Rhode Island license plates, which they knew at that time could be easily obtained to register stolen vehicles. After locating the car's vehicle identification number from outside the vehicle through the windshield, Kollmann checked this number and the license plate number first with the registry of lost property for New York City and, upon learning that the car was not registered there, checked by telephone with the National Crime Information Center ("NCIC"). The National Crime Information Center has a computer that contains reports of stolen vehicles, boats, articles, and wanted persons throughout the United States. (Tr. 9-11, 348).

* "Tr." refers to the transcript of the suppression hearing. "G.P. Tr." refers to the transcript of the defendants' pleas of guilty. "B.S. Tr." and "N.S. Tr." refer to the transcripts of Brown's and Nicholas's sentencing, respectively. "GX" refers to Government's Exhibits in evidence at the hearings.

Upon checking with NCIC, Kollman received a report that a vehicle with the vehicle identification number and the description of the vehicle in question had been reported stolen approximately three weeks before in Boston, Massachusetts.* The officers waited until three males got into the car and, after they drove approximately one block, arrested them for possession of a stolen vehicle and advised them of their constitutional rights. (Tr. 12).**

After the occupants of the automobile were placed under arrest and frisked, Officer Smith drove the car to the 20th Precinct station house, where the car was placed in the parking lot adjacent to the precinct. (Tr. 12-13, 41). Pursuant to standard procedure, Kollmann proceeded to inventory the contents of the vehicle and voucher the valuables so that valuables would not be taken from the vehicle when it was removed from the 20th Precinct lot to the auto yard/pound on 215th Street where such automobiles are held. (Tr. 15, 339).*** The inventory of the automobile consisted of examination of the trunk and of the interior of the car, including the glove compartment, the sun visor and the area under the seats. While examining the interior of the car, Kollmann found a shaving

* On the basis of his experience, Kollmann considered this information particularly reliable: because the car had been reported stolen in Massachusetts and now had different license plates (Rhode Island); and because there was a short lapse of time since the car had been reported stolen. (Tr. 10-11).

** Subsequent investigation by Kollmann confirmed that the car had been reported stolen in Boston. (Tr. 19).

*** This inventory procedure, which is set forth in Section 113 of the New York City Police Department Patrol Guide, requires that a vehicle taken into custody by the police department be safeguarded for the original owner. According to this procedure, at the time an automobile is taken into custody, all valuables in the car, such as jewelry, clothing and money are inventoried and vouchered. (Tr. 13-15). Kollmann testified that his inventory of the automobile was performed in accordance with the police regulations. (Tr. 15).

kit on the floor of the front passenger seat. Upon unzipping the shaving kit, he found fifty counterfeit \$20 bills, all with the same serial number. (Tr. 14-15, 48, 335, 339-40).

Kollmann advised the United States Secret Service of the arrests, and Special Agents Joseph L. Gallo and Richard Boland responded to the 20th Precinct, where they interviewed the prisoners separately. Agent Boland interviewed Brown, who gave his name as Kenneth Le Roy Brown. Brown stated that he had no knowledge of any counterfeit in the automobile. (Tr. 16, 78-80). At the beginning of his interview of Nicholas, Agent Gallo, pursuant to standard procedure, fully advised Nicholas of his constitutional rights, according to Secret Service Form SS 1737. (GX. 6). After being advised of his rights, Nicholas, who had given his name as Jerome Richardson, revealed his true name. Nicholas then acknowledged possession of the counterfeit money. (Tr. 79-82). Nicholas also asked Gallo if the whole matter could be dropped, to which Gallo replied that the prosecution could not be dropped but that any information that Nicholas provided would be brought to the attention of the Assistant United States Attorney. (Tr. 89-91). That same day Gallo obtained federal arrest warrants for Brown and Nicholas. (Tr. 82).*

The next day, May 2, 1973, after their arraignment in Manhattan Criminal Court, Brown and Nicholas were released and the federal warrants for their arrests were executed.** They were taken to the New York Field Office

* The third person arrested in the car, James Brown, disclaimed knowledge of the counterfeit money, and federal prosecution of him was declined. (Tr. 82).

** The three suspects were charged in the state court with grand larceny/auto, criminal possession of stolen property, unauthorized use of a motor vehicle, and criminal possession of forged instruments. (Tr. 16).

of the United States Secret Service for processing. At the beginning of the interview with Brown, Gallo fully advised Brown of his constitutional rights, including his right to remain silent, to be represented by an attorney and that anything he said could be used against him in a court of law. (Tr. 82-84). Brown signed the Secret Service advice of rights form, acknowledging that he had been advised of and understood his constitutional rights. (GX. 7). The form was signed in the name of Kenneth L. Brown, which name Brown had been using through the initial part of this interview. (Tr. 102-104). Brown then confessed to purchasing and possessing the counterfeit money. Brown also implicated his co-defendant, whom he referred to as Jerome Richardson. (Tr. 83-84).

Louis Travaglino, then a Special Agent of the United States Secret Service, interviewed George Nicholas at the Secret Service field office on May 2, 1973. He read Nicholas his constitutional rights from an advice of rights form which fully set forth those rights. Nicholas was told that he had the right to remain silent, that anything he said could be used against him, and that he had the right to be represented by an attorney. Travaglino also explained the rights to Nicholas, and Nicholas acknowledged that he understood them, though he refused to sign the form. (Tr. 60-64, 70; GX. 5).^{*} Nicholas admitted that he and his co-defendant had purchased the counterfeit notes, he identified the source of the notes, and he agreed to cooperate with the Government. (Tr. 64).

^{*} The form contained notations indicating that the constitutional rights had been read and explained to Nicholas, that Nicholas had acknowledged his understanding and refused to sign the form, and that Secret Service Agent William A. Gnizdowski witnessed Travaglino's advising Nicholas of his rights.

After being processed at the Secret Service office, Brown and Nicholas were taken to the office of Nicholas Figueroa, then an Assistant United States Attorney for the Southern District of New York. Figueroa interviewed each of the defendants and obtained pedigree information from them. Subsequently, the defendants were presented to the United States Magistrate and were released on their own recognizance. (Tr. 92-93, 125, 155-56).

Nicholas Figueroa testified that when he interviewed the defendants on May 2, 1973, they expressed an interest in cooperating. Although he had no distinct recollection, he said that the ordinary procedure of the United States Attorney's office at the time was to inform the defendants that their cooperation would be brought to the attention of the sentencing judge. Figueroa had no recollection of deviating from that procedure. (Tr. 158-60). Figueroa testified that he never acknowledged in any way in discussions with the defendants that if either of them cooperated that person would not be indicted. (Tr. 161).

John Curley, the attorney who initially represented Vincent Brown, testified on the basis of file memoranda that in mid-June 1974, he met briefly with Brown and he advised Figueroa that Brown had indicated that the indictment was a mistake. Figueroa stated at that time that there was no mistake and that Brown had been told that he would be indicted. Curley further testified that at an August 12, 1974 meeting Brown stated that he had never been told that he would not have to plead guilty to criminal charges. (Tr. 187-94).

C. The Defense Case

George Nicholas's testimony at the suppression hearing was vague and evasive. Nicholas's testimony did not

directly take issue with Officer Kollmann's and Officer Santoli's testimony that an inventory search was conducted. Nicholas claimed, however, that at the scene of the arrest the three officers searched the persons of the occupants of the car and searched the car itself. According to Nicholas the shaving kit was obtained in that search of the car. (Tr. 114, 130-31). On cross-examination, Nicholas testified that the search of the car took place at the same time as the search of the three prisoners and that the shaving kit was opened at that time. He could recall the officers' "going in the car, getting this satchel out, and that was it. When they found the satchel there wasn't any more searching, as I recall." (Tr. 130-31).*

In his affidavit in support of the motion to suppress, the defendant Nicholas stated that he did not remember being advised on May 2, 1973, when he was turned over to the United States Secret Service, of his right to an attorney or of his right not to answer questions, and that he was certain he was not told that anything he said could be used against him. However, at the suppression hearing, Nicholas testified that he did not remember which Secret Service agents he spoke with on either May 1 or May 2, and he did not remember what he had told them. (Tr. 119-20, 127-28, 135-36). He never specifically denied being advised of his constitutional rights on either occasion, and stated that from prior involvement with the

* Nicholas testified that he was never told by the officers that he was being arrested for possession of a stolen vehicle and that he did not learn until his appearance in state court on May 2, 1973 that this was the reason for his arrest. (Tr. 113, 116). When confronted with his affidavit in support of the suppression motion, in which he stated that he had been informed by the police that the car was stolen, Nicholas testified that this was only his "theory" of the case and not a statement of fact. (Tr. 132-34).

law he knew what his constitutional rights were. (Tr. 126-27). Nicholas testified that he and the agents had an understanding that what he said would not be used against him. When asked if the agents had told him that and when asked how the alleged agreement had come about, Nicholas refused to give direct answers. (Tr. 119, 128-29).

Nicholas further testified that the agents told him that if he and Brown cooperated by obtaining the plates for the counterfeit money, they would be released. (Tr. 119). When asked on cross-examination if this was actually said to them by the agents, Nicholas admitted that this was not said "directly" but claimed that "everybody agreed in more words or less," though he would not say how this was done. (Tr. 136-37). Nicholas also claimed that then-Assistant United States Attorney Figueroa offered him and Brown immunity from prosecution. (Tr. 124). He could not indicate how this was done, but said that "whatever [Figueroa] said he left the impression" that the charges would be dismissed. (Tr. 137-38).

Vincent Brown testified that at the scene of the arrests, the automobile was searched but nothing was taken from the car.* Brown stated that it was not until after they were brought into the station house that he was first

* Brown also testified that the officers told the defendants that they were looking for guns and did not say anything about a stolen vehicle. Brown said that he was first told at the station house that the automobile was reported stolen. (Tr. 236-37, 240).

Winifred Davis, Vincent Brown's sister, claimed that she owned the car in which the defendants were arrested and that she never reported it stolen. She produced a handwritten document with no official markings that purported to be a bill of sale. (Tr. 213-45; Def. Brown's Ex. A).

asked about the money. (Tr. 236-40).^{*} Brown further testified that he was told by Nicholas that he (Nicholas) had a deal that if they cooperated with the authorities they would not be prosecuted. Gallo and Figueroa, he said, later told him that his was the deal. (Tr. 243-46, 261-64).

D. The District Court's Decision

In denying all of the defendants' motions, the District Court thoroughly reviewed the testimony presented at the hearing and made extensive findings of fact. (Tr. 288-90, 379-85, 413-24). Judge Stewart denied the defendants' motions to suppress the counterfeit money, finding that there was probable cause to make the arrest and that the money was discovered in the course of a proper inventory search made at the police station. Judge Stewart specifically rejected the defense testimony to the contrary. (Tr. 381).^{**}

With respect to the defendants' motion to suppress their statements, Judge Stewart found that the appropriate *Miranda* warnings were given in all instances. (Tr. 288). In connection with the defendants' claims of a non-

^{*} Brown's testimony contradicted not only the testimony of Nicholas, who said that the money was found at the scene of the arrest and that no reason was given for the arrest; it also contradicted the testimony of James Brown, the third person in the car at the time of defendants' arrests. James Brown testified that the car was searched at the scene of the arrests and that no explanation was given for the arrests. He further testified that the kit containing the money was found at the scene of the arrest and that the officers opened the kit and found the money in the presence of himself and Vincent Brown as they were pulling into the property of the police station. (Tr. 277, 284).

^{**} Alternatively, Judge Stewart found that if the counterfeit money was found at the scene of the arrest or en route to the station house, as the defendants testified, then the seizure was lawful as incident to a lawful arrest. (Tr. 381).

prosecution agreement, Judge Stewart found that neither the agents nor the Assistant United States Attorney had made any such agreement and that at most they had indicated that any cooperation by the defendants would be brought to the attention of the sentencing judge. Judge Stewart further found that no efforts were made by the agents or Assistant United States Attorney to intentionally mislead the defendants with respect to subsequent prosecution. (Tr. 423-24).

In denying the defendants' motions to dismiss the indictment for failure to provide a speedy trial, Judge Stewart found that Nicholas's absence between April 1974 and May 1977 was completely unexplained and that Brown was unavailable through no fault of the Government. (Tr. 384).*

POINT I

The Seizure of the Counterfeit Money From Stolen Car Was Lawful.

Brown and Nicholas claim that the District Court incorrectly held that the counterfeit money seized from a shaving kit found in the car was admissible. While on appeal they do not contest the validity of the arrest, they do claim that the search of the shaving kit was improper in view of the Supreme Court's recent decision in *United States v. Chadwick*, 433 U.S. 1 (June 21, 1977). The defendants' claims are without merit.

Even assuming *arguendo* that *Chadwick* would have some relevance to the facts of this case, this Court's decision in *United States v. Reda*, 563 F.2d 510 (2d Cir. 1977), holding that *Chadwick* is not to be applied retroactively, is dispositive since the search at issue occurred

* A complete discussion of matters pertaining to the defendant's speedy trial claims is contained in Point III *infra*.

on May 1, 1973.* *Reda* involved a pre-*Chadwick* search without a search warrant of a small cardboard box in the defendant's possession at the time of his arrest. The box was taped closed and was not opened by the agents until several hours after the arrest. This Court held that under established precedent prior to *Chadwick* the contraband found in the box would have been admitted without hesitation, and that in light of this precedent the agents were obviously acting in good faith. As in *Reda*, when the police officers in this case opened the shaving kit shortly after its seizure in the course of the inventory search on May 1, 1973, they were clearly acting in good faith reliance on established precedent.**

In any event, since the counterfeit money was, as Judge Stewart found, discovered as the result of a routine inventory search—and the defendants do not contend otherwise—the money was admissible. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976). In *Opperman*, contraband was found during an inventory search in the glove compartment of a lawfully impounded, locked car. The Court rejected the argument that a warrant was

* *Reda* was decided by this Court on October 12, 1977, subsequent to Judge Stewart's decision below. See also *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977) (holding also that *Chadwick* is not to be applied retroactively).

** The law is established that when the police take custody of any sort of container—whether it is an automobile, suitcase or any other thing in which property may be stored—it is reasonable to search the container, whether to itemize the property or as a search incident to a lawful arrest. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 21 n. 2 (1977), and cases cited therein (Blackmun, J., dissenting); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Harris v. United States*, 390 U.S. 234 (1968); *Cooper v. California*, 386 U.S. 58 (1967); *United States v. Reda*, 563 F.2d 510, 511-12 (2d Cir. 1977), and cases cited therein; *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States v. Zaicek*, 519 F.2d 412 (2d Cir. 1975); *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976); *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973); *People v. Sullivan*, 29 N.Y. 2d 69, 272 N.E. 2d 464 (1971).

required,* stating that the concept of probable cause is "peculiarly related to criminal investigations, not routine, noncriminal procedures" such as the inventory of a car. 428 U.S. at 370 n.5.** Clearly, the inventory in the instant case was made for the routine, noncriminal purpose of accounting for the contents of the car—and not to obtain

* See also *Cooper v. California*, 386 U.S. 58 (1967) (contraband found in glove compartment during inventory of impounded car one week after owner arrested on narcotics charge, he'll admissible despite lack of warrant and no probable cause for search); *Harris v. United States*, 390 U.S. 234 (1968) (introduction of evidence obtained without warrant from car impounded as evidence of robbery, after defendant was arrested entering car, upheld on ground that search was pursuant to police department regulation that impounded vehicle be searched thoroughly and all valuables be removed from it); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (evidence of murder seized in warrantless search of car trunk held admissible after car towed subsequent to accident, since search was pursuant to standard procedure in police department; owner of car shortly thereafter charged with drunken driving and later convicted of murder).

** In *Opperman*, the car was impounded for a parking violation. After being taken to the impound lot, the car door was unlocked and, pursuant to standard police procedures, an officer inventoried the contents of the car. The officer found a quantity of marijuana in a plastic bag inside the glove compartment. When the car owner appeared to claim his car, he was arrested on charges of possession of marijuana. The Supreme Court held that the use against him of the marijuana seized from the glove compartment was proper.

Pointing out that "[w]hen vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents," the Court stated that these procedures developed in response to three distinct needs: (1) "the protection of the owner's property while it remains in police custody;" (2) "the protection of the police against claims or disputes over lost or stolen property;" and (3) "the protection of the police from potential danger." The Court also stated: "In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned." 428 U.S. at 369. It was for similar reasons that the inventory in this case was performed.

evidence of the crime with which the defendants were charged.* Indeed, the need for an inventory search was particularly compelling in this case because the police had taken custody of an automobile which they knew had been stolen, and consequently it was necessary to inventory the car's contents to protect the city from any claims from the car's lawful owner.

* Brown and Nicholas suggest that the police should have returned the shaving kit to them instead of opening it. The dissent in *Opperman* advanced a similar theory, claiming that any car owner should be able to prevent the police from a protective search. 428 U.S. at 392-93. The majority rejected this proposition, pointing out that the inventory is for the protection of the police and the municipality as well as the car owner. 428 U.S. at 376 n.10. Moreover, even the dissent was referring to the legitimate owner of the car and not persons such as the defendants Brown and Nicholas who were found in possession of a stolen car.

Moreover, the defendants' contention that it is significant that the counterfeit was found in a shaving kit inside the automobile as opposed to being in plain view or in an open area must be rejected. The case law makes no such distinction. See, e.g., *United States ex rel. Muhammed v. Mancusi*, 432 F.2d 1046 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971); *United States v. Zaicek*, 519 F.2d 412 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1104-05 (2d Cir. 1975); *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973); and cases cited in footnote at page 12 *supra*. In *Opperman*, for example, it made no difference that the contraband was found in a plastic bag inside the glove compartment. 428 U.S. at 366.

Brown's argument that there was no security problem with respect to the car in the lot at the 20th Precinct is of no consequence. First, Kollmann testified that the reason for the inventory was the concern for the security of the car when it was removed from the 20th Precinct to the auto pound at 215th Street, not concern for its security at the 20th Precinct. (Tr. 15). Second, the possibility that in a particular situation the reasons for having a standard inventory procedure are inapplicable does not invalidate that procedure.

Finally, there is absolutely no evidence in the record to support Brown's contention that the inventory search "was merely a subterfuge." (Br. at 8-9).

Moreover, the decision in *Opperman* was reaffirmed in *Chadwick*, in which the Supreme Court specifically excluded inventories from the scope of its ruling:

"In circumstances involving non-criminal inventory searches where probable cause to search is irrelevant, we have recognized 'that search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept.' *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976). *This is so because the salutary functions of a warrant simply have no application in that context; the constitutional reasonableness of inventory searches must be determined on other basis.*" 433 U.S. at 10 n.5 (emphasis added).

POINT II

The District Court Properly Found That the Defendants' Statements Were Voluntary and That There Was No Agreement of Non-Prosecution.

Brown and Nicholas contend that the District Court erred in finding that the defendants' statements were properly and voluntarily obtained. Brown argues that his statements should have been suppressed because he had the "subjective feeling" that he would not be prosecuted if he cooperated. Brown concedes that he was given his *Miranda* warnings. Nicholas claims that he was promised immunity from prosecution if he cooperated or, at least, that efforts were made to mislead him in this regard. Nicholas also asserts that he was not advised adequately of or did not understand that the statements he made could be used against him. These claims are meritless. Judge Stewart decided each one of these claims

adversely to the defendants, and his decision was clearly compelled by the overwhelming evidence below.*

The uncontradicted evidence at the suppression hearing was that the defendants were advised fully of their constitutional rights, first on May 1, 1973 and again on May 2, 1973. In addition, on May 2, Brown signed an advice of rights form acknowledging that he had been advised of his constitutional rights. Although Nicholas refused to sign this form on May 2, the rights were read and explained to him and he acknowledged that he understood them. (Tr. 79-84, 102-04). The defendants were also advised of their constitutional rights by Assistant United States Attorney Figueroa when they were brought to his office. (Tr. 155, 244-B). Thus, each of the defendants was repeatedly warned—and Brown concedes this—that any statements he made could be used against him.**

The record is clear, moreover, that after Nicholas inquired if the entire matter could be dropped, the defendants were merely told that if they cooperated their cooperation would be brought to the attention of the Assistant United States Attorney. Neither defendant was ever told that if he cooperated his statements would not be used

* The law in this Circuit is clear that a trial judge's decision on a motion to suppress will not be set aside unless clearly erroneous. *United States v. Friedman*, 558 F.2d 1125 (2d Cir. 1977); *United States v. Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States v. D'Avanzo*, 443 F.2d 1224 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). Moreover, on appeal the evidence at the suppression hearing must be viewed in the light most favorable to the Government. *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977).

** Nicholas testified that from his prior arrests he was aware of his constitutional rights. (Tr. 127). The defendants were also warned of their constitutional rights by the arresting police officers. (Tr. 12).

against him or that his cooperation would result in a decision by the Government not to prosecute him.

Agent Travaglino testified that he did not tell Nicholas, nor has he ever told anyone, that in the event he cooperated nothing he said would be used against him in a court of law. (Tr. 74). Travaglino further stated that he never promised immunity to these defendants or to anyone else. (Tr. 74). Agent Gallo testified that in his discussions with the defendants he never promised either of them that they would not be indicted for the offenses they had committed and that he did not remember telling or intimating to either of them that if they cooperated the statements they made would not be used against them. (Tr. 104-05, 108). Gallo further testified that he never heard Assistant United States Attorney Figueroa promise the defendants that they would not be indicted.

Figueroa testified that the defendants expressed to him their interest in cooperating, and that according to his ordinary procedure, he would have informed them that their cooperation would be brought to the attention of the sentencing judge. Figueroa said that he never acknowledged in any way in discussions with either of the defendants that if they cooperated they would not be indicted. (Tr. 158-61). Figueroa further testified that he was not aware of any non-prosecution agreement between the agents and the defendants and that he never told Brown that the prosecution would be dropped or that he would not be indicted. (Tr. 162, 165).^{*} Finally, John Curley, Brown's attorney at the time, testified that Brown admitted to him in August 1974 that he had never been told that he would not have to face criminal charges. (Tr. 191-94).

^{*} Figueroa testified that during his tenure as an Assistant United States Attorney he had offered immunity from prosecution on only one occasion and then only after obtaining permission from the Chief of the Criminal Division. (Tr. 166).

In view of this evidence, Judge Stewart correctly decided not to credit the evasive and contradictory testimony of Nicholas and Brown. Nicholas merely asserted that he had an "understanding" with the agents that what he said would not be used against him, but would not explain how that agreement had come about. (Tr. 128-29, 135-36). Nicholas similarly could not explain his assertions that both the agents and Figueroa had offered immunity in exchange for cooperation. He admitted that neither the agents nor Figueroa had actually told him and Brown that this was the agreement.* Figueroa, Nicholas said, "acknowledged" the deal when the defendants met with him not in words to that effect but by releasing the defendants on their own recognizance. (Tr. 136-39).**

Nicholas's testimony was contradicted by Brown. Brown testified that when he and Nicholas met with Figueroa (with Gallo present), Nicholas very clearly stated that there was a deal that they would not be prosecuted if they cooperated.*** Brown further testified

* Nicholas testified as follows:

Q. Are you telling us that the agents then said to you, "Okay, as soon as you get us the plates [for the counterfeit money] we'll let you go"?

A. Not that directly. You know, they would use a little more discretion than that.

Q. What was the discretion that was used? . . .

A. Like that everybody agreed in more words or less.

. . .

Q. Did he ever say to you, Mr. Figueroa, "The deal is that we won't prosecute you at all for this offense"?

A. Not in them words, no. (Tr. 136-39).

** Such a condition of release is certainly consistent with an agreement that the defendants would cooperate and their cooperation would be made known to the sentencing judge.

*** Interestingly, Brown said that he first heard about this "deal" from his co defendant, Nicholas, who had confessed before Brown had admitted anything. (Tr. 261).

that Figueroa then responded that they had his word on this deal. (Tr. 267-71).

As Judge Stewart held, at most, the Government indicated to the defendants that their cooperation would be brought to the attention of the sentencing judge. It is entirely permissible to urge a defendant to cooperate, and even to suggest that he may be treated more leniently if he does. *United States v. Reynolds*, 532 F.2d 1150, 1156-60 (7th Cir. 1976); *United States v. Williams*, 479 F.2d 1138 (4th Cir.), *cert. denied*, 414 U.S. 1025 (1973); *United States v. Glasgow*, 451 F.2d 557, 558 (9th Cir. 1971); *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970). This Court has held that it is proper for agents to apprise a defendant of the benefits of cooperation and to evaluate the opinions before him:

"Having fairly and fully advised [the defendant] of his constitutional rights, as required by *Miranda*, the agents were free to discuss with the defendant the reasons why he should cooperate. It was quite proper in the course of such discussion to mention the situation which [the defendant] faced and the advantages to him if he assisted the Government. The agents stated facts; they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching." *United States v. Pomares*, 499 F.2d 1220, 1222 (2d Cir.), *cert. denied*, 419 U.S. 1032 (1974).

See also *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967). Since the record plainly shows that nothing more was done here, the defendants' claims on appeal must be rejected. In this case, every effort was made by the agents and by the Assistant United States Attorney to warn the defendants that their statements could be used against them and to advise the defendants concerning their prosecution.

POINT III

The Defendants Were Not Denied Any Rights to a Speedy Trial.

Brown and Nicholas next contend that the indictment should be dismissed because they were denied their rights to a speedy trial. In the District Court, the speedy trial issue was not raised by either defendant, but was raised *sua sponte* by Judge Stewart. After making an exhaustive inquiry, Judge Stewart found that the defendants were not denied their rights to a speedy trial. This decision was entirely correct.

On appeal Brown claims that the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* was violated because at the time his guilty plea was entered the time in which he had to be tried under the Act had run. Nicholas claims that the period between his arrest on May 23, 1977, and the commencement of the pre-trial proceedings on September 6, 1977, during which time he was in custody, violated the Act and the Plan for Prompt Disposition of Criminal Cases for the Southern District of New York ("Plan"). Nicholas also advances the claim that his constitutional right to a speedy trial was violated.

A review of the relevant dates in this case conclusively demonstrates that any delay in this case was a result of the defendants' fugitivity, that neither defendant was prejudiced by the delay, and that the Act and the Plan were complied with. The indictment was filed on July 25, 1973, and the defendants were notified to appear for arraignment on the indictment on August 6, 1973. When the defendants failed to appear for arraignment on August 6, bench warrants were issued for their arrests. Nicholas was arrested in Las Vegas, Nevada

in April 1974, and on April 30, 1974, he was released on bail on the condition that he report to the Southern District of New York, which he did not do. (Tr. 292-93). The record revealed that on August 12, 1974, Assistant United States Attorney Figueroa met with Brown and his attorney, and that in mid-June 1974 Brown's attorney informed the Assistant that Brown was in the defense attorney's office. (Tr. 187-94). On August 7, 1974, the Government filed a notice of readiness for trial. After Brown's attorney at that time, John Curley, filed suppression motions on December 12, 1974, a preliminary hearing was scheduled for January 10, 1975. (Tr. 319). At the request of Mr. Curley, the hearing was postponed until February 26, 1975 because Brown physically was unable to attend. Notices were sent to both defendants to appear before Judge Stewart on February 26, 1975.

On February 24, 1975, Mr. Curley notified Judge Stewart that he was unable to contact Brown either directly or through Mr. Wiley, who represented Brown in the proceedings below and represents him in this Court. Mr. Curley requested and was granted an additional postponement of the hearing until March 11, 1975, by reason of Brown's physical incapacity. When the defendants failed to appear at the March 11, 1975 hearing, bench warrants were issued for them. (Tr. 317-21).

In March 1976, Brown was arrested in Providence, Rhode Island. After waiving his rights to a removal hearing, Brown agreed on March 18, 1976 to plead guilty to the indictment in Rhode Island pursuant to Rule 20, F. R. Crim. P. Brown later decided not to plead guilty and was ordered to appear in the District Court in Rhode Island on July 16, 1976. Brown failed to appear, and a warrant was issued for his arrest. (Tr. 299-301).

Meanwhile, in late 1975 and early 1976 efforts were made to no avail to locate Brown in the Providence area.

In addition, in August 1976, agents of the Secret Service contacted both Mr. Wiley and Brown's father in order to locate Brown, but they were unsuccessful. In January, 1977, further attempts were made to locate Brown through confidential informants. (Tr. 307-08). On February 28, 1977, Judge Stewart issued a bench warrant for Brown and set bail on the warrant at \$50,000 cash or surety. (Tr. 303).

Nicholas was arrested in Massachusetts on May 23, 1977. After removal proceedings, Nicholas arrived at the Metropolitan Correctional Center in New York on July 5, 1977. (Tr. 292, 314). Brown was arrested in Rhode Island on July 8, 1977, and after removal proceedings arrived in New York on or about August 5, 1977. (Tr. 290, 298). On August 10, 1977, Brown was released on \$5,000 cash bail. (Tr. 298). Nicholas remained incarcerated throughout the proceedings below.

In view of Brown's repeated fugitivity, his speedy trial claim must be rejected. Brown became a fugitive in August 1973, very shortly after the filing of the indictment, and a warrant was issued for his arrest. It was not until mid-1974 that his whereabouts became known to the Government, and at that time prompt efforts were made to bring him to trial. A preliminary hearing was scheduled for January 10, 1975, but at Brown's request was postponed on two occasions due to his physical incapacity and was rescheduled for March 11, 1975. When Brown failed to appear for that hearing, another bench warrant was issued. Brown was not located until March 1976, when he was arrested in Rhode Island. After the Rule 20 negotiations fell through, Brown again became a fugitive on July 16, 1976, and was arrested on July 8, 1977.

The time limitations of the Speedy Trial Act did not begin to run as to this indictment until July 1, 1976.

18 U.S.C. § 3163(b)(2). In any event, it is clear that on each occasion both before and after this date that the Government was aware of Brown's whereabouts it attempted to bring him to trial, but on each occasion Brown became a fugitive.* Under the Act, the applicable period for the commencement of Brown's trial (*i.e.*, 180 days from July 1, 1976, 18 U.S.C. § 3161(g))** was tolled until at least July 8, 1977 when he was arrested in Rhode Island. The entire period of delay is excludable due to Brown's absence. 18 U.S.C. § 3161(h)(3)(A). Not only were his whereabouts unknown to the Government, he was attempting to avoid apprehension and several unsuccessful efforts were made to apprehend him. 18 U.S.C. § 3161(h)(3)(B). When Brown was arrested and removed to New York on or about August 5, 1977, hearings were promptly held and he pled guilty on September 20, 1977,*** well within the Act's time limits.

Moreover, in August 1974 by filing a notice of readiness the Government complied with the only speedy trial time requirement then effective—the six month readiness requirement in Rule 4 of the 1973 Plan. Brown and Nicholas were arrested on May 1, 1973 and became fugitives on August 6, 1973. The period of time from August 6, 1973 until June 1974 when the Assistant United States

* There is absolutely no evidence in the record to support Brown's statement in his brief that "his right to a speedy trial was denied at the behest of the Government inasmuch as the Government, in seeking his cooperation, purposely delayed said trial." Br. at 13.

** In his brief Brown misconstrues the Speedy Trial Act's time provisions by referring only to 18 U.S.C. § 3161(c) and ignoring the applicable provision of 18 U.S.C. § 3161(g).

*** The period between Brown's arrest and his removal to New York, and the delay resulting from the hearing on the pretrial motions are also excludable. 18 U.S.C. § 3161(h)(1)(E) & (F).

Attorney was informed of Brown's whereabouts is excluded under Rule 5 of the 1973 Plan. Thus, the filing of the notice of readiness on August 7, 1974 was timely.

Nicholas's claim that the indictment should be dismissed because he was held in continuous custody for over 90 days simply misconstrues the applicable law. Under Section 3164(b) of the Speedy Trial Act and Section 6(a)(1) of the Speedy Trial Plan, the trial of a defendant held in custody must commence within ninety days following the beginning of continuous custody. The appropriate remedy for failure to comply is, at best, the release of the defendant from custody and not dismissal of the indictment. 18 U.S.C. § 3164(c); Plan, Section 11(a). Moreover, Nicholas's rights under this section were not violated. Excludable from this ninety-day time limit is any period of "delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure." 18 U.S.C. § 3161(h)(1)(F); Plan, Section 10(a). In Nicholas's case, the period from May 23, 1977 until July 5, 1977, when the warrant of removal from Massachusetts was executed and Nicholas arrived in New York, constitutes delay resulting from removal proceedings conducted pursuant to Rule 40 of the Federal Rules of Criminal Procedure and is excludable from the ninety-day time limit. Thus, when the time limit is computed from July 5, 1977, Nicholas's plea of guilty on September 20, 1977 came well within the ninety-day period.*

Nicholas's claim that he was denied his constitutional right to a speedy trial by reason of the delay between his indictment on July 25, 1973 and the commencement

* There is, of course, additional excludable time during this period for delay resulting from the hearings on the pretrial motions. See 18 U.S.C. § 3161(h)(1)(E).

of proceedings in September 1977 is preposterous. As set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), four factors are to be considered in determining whether a defendant has been denied his Sixth Amendment right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice resulting to the defendant from the delay.* See *United States v. Carini*, 562 F.2d 144, 148 (2d Cir. 1977). Here, the delay in bringing Nicholas to trial was clearly the result of his own attempts to avoid apprehension and prosecution. Nicholas's absence during the period from mid-1973 until mid-1977 was entirely unexplained. Moreover, Nicholas never asserted his right to a speedy trial during his fugitivity or after his arrest in 1977 until Judge Stewart raised the issue at the proceedings below.** Finally, Nicholas has suffered no prejudice as a result of the delay. He was at liberty until his apprehension in 1977, and his defense was not impaired as a result of the delay. See *United States v. Lord*, Dkt. Nos. 77-1157-1159, slip op. 347 (2d Cir. November 15, 1977).***

* These four factors comprise "[a] balancing test [which] necessarily compels courts to approach speedy trial cases on an *ad hoc* basis". 407 U.S. at 530.

** Nicholas had been assigned counsel upon presentment to the Magistrate after his federal arrest on May 2, 1973. He was also represented by counsel in Las Vegas.

*** Nicholas argues that he was prejudiced by the inability of certain prosecution witnesses to recall specific matters. (Br. at 34). This argument must be rejected. First, the record indicates that such lapses of memory were insignificant. Second, these failures pertained to prosecution witnesses, while Nicholas, Brown and the other defense witnesses demonstrated extraordinary ability to remember specific matters. Since the burden of proof below was with the prosecution, clearly the defense was not impaired. See *Barker v. Wingo*, 407 U.S. 514, 532, 534 (1972).

POINT IV

The Sentence Imposed on Nicholas by the District Court Was Proper and Not Reviewable.

Nicholas makes the bare assertion that his sentence of three years imprisonment was excessive. In particular, Nicholas claims that his sentence was longer than the sentence imposed by the United States District Court for Rhode Island on the person convicted as a result of his cooperation. (Br. at 23, 35). The argument is frivolous.

This Court has consistently declined to review sentences within the statutory maximum unless the record indicates reliance by the trial court on materially incorrect information or some constitutionally impermissible practice in connection with the imposition of sentence. *United States v. Seijo*, 531 F.2d 694 (2d Cir. 1976); *United States v. Estremera*, 531 F.2d 1103, 1113 (2d Cir. 1976). See also *Dorszynski v. United States*, 418 U.S. 424 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1977); *United States v. Lamont*, 565 F.2d 212 (2d Cir. 1977). At sentencing in this case the District Court properly relied on the defendant's long criminal history, his record of fugitivity, the presentence report by the United States Probation Office and the materials and statements presented on behalf of the defendant. (N.S. Tr. 7-8). The sentence imposed in the District of Rhode Island on the person against whom Nicholas cooperated has little or no relevance to Nicholas's sentence; and, in any event, this information was supplied to Judge Stewart in the presentence report. Thus, there is simply no basis to review the sentence, which clearly was within the statutory limit.

POINT V**The District Court Properly Denied Brown's Motion to Withdraw His Guilty Plea.**

Brown states in his brief without elaboration the contention that the District Court should have granted his motion to withdraw his guilty plea on the ground that his counsel did not have adequate time to prepare for trial.^{*} The claim is without merit.

When Brown pled guilty on September 20, 1977, the date for his sentencing was set for October 21, 1977. (G.P. Tr. 19). Brown failed to show for sentencing on that date, and Judge Stewart issued a bench warrant for Brown's arrest. (N.S. Tr. 4). Immediately prior to Brown's sentencing on November 3, 1977, he moved to withdraw his plea of guilty on the grounds that he had a meritorious defense and that he was not given adequate time to prepare his defense and investigate the case. (R.S. Tr. 2-4).

In denying Brown's motion,** Judge Stewart pointed out the following: that his motion was made literally at the last minute and only after the sentencing of co-

* Brown originally moved in this Court and was granted on February 2, 1978 additional time in which to file a supplemental brief and appendix on this issue for the reason that he had not obtained the transcript of the hearing on this motion. Brown then moved to dispense with the filing of the supplemental brief and appendix, stating that sufficient facts were stated in his original brief. This Court granted the motion to dispense with the filing on February 23, 1978.

** Brown also moved for an enlargement of time to prepare an adequate defense and for Judge Stewart to disqualify himself at trial. Judge Stewart did not decide these motions, having denied Brown's motion to withdraw his guilty plea.

defendant Nicholas on October 21; that the matters raised at the suppression hearing were fully litigated and that Brown had sufficient time for investigation; that the matters which defense counsel stated should be investigated were insignificant; and that Brown admitted at his guilty plea that he knowingly and unlawfully possessed the counterfeit money. (B.S. Tr. 13-15; Tr. 431).

Judge Stewart's ruling that Brown had not satisfied his burden for withdrawing the guilty plea was certainly within the "large discretion" confided to District Judges in considering such motions under Rule 32 of the Federal Rules of Criminal Procedure. See, e.g., *United States v. Saft*, 558 F.2d 1073, 1082 (2d Cir. 1977); *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977).^{*} Brown's plea of guilty was considered and deliberately made after consultation with counsel. The plea followed a lengthy suppression hearing at which the Government's presentation of evidence was more extensive than would have been necessary at trial. Brown heard that evidence, he testified in his own defense and he pled guilty after the suppression motions were denied. Brown has never contested his guilt, and he made a complete and proper allocution pursuant to Rule 11 of the Federal Rules of

^{*}A motion for withdrawal of a plea of guilty is addressed to the discretion of the court and the defendant carries the burden of satisfying the trial judge that there are grounds for such withdrawal. *United States v. Lombardozi*, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971); *United States v. Fernandez*, 428 F.2d 578, 580 (2d Cir. 1970); *United States v. Giuliano*, 348 F.2d 217 (2d Cir.), cert. denied sub nom. *Prezioso v. United States*, 382 U.S. 939 (1965). The trial judge's determination whether that burden has been met will be upset on appeal "only if clearly erroneous." *United States v. Lombardozi*, supra, 436 F.2d at 881; *United States v. Podell*, 519 F.2d 144, 148 (2d Cir.), cert. denied, 423 U.S. 926 (1975); *United States v. Hughes*, 325 F.2d 789, 792 (2d Cir. 1964).

Criminal Procedure.* The only change in circumstances between Brown's plea of guilty and his motion to withdraw the plea was the sentencing of his co-defendant, George Nicholas, to three years imprisonment. This, of course, is an insufficient basis for the withdrawal of a guilty plea. See *United States v. Michaelson*, 552 F.2d 472, 476 (2d Cir. 1977); *Hugh v. United States*, 288 F.2d 427, 431 (D.C. Cir. 1961).**

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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 Southern District of New York,
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 of America.*

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 RICHARD D. WEINBERG,
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* Brown's claim that further investigation was necessary is without merit. As Judge Stewart found, the matters that he desired to investigate would have had little or no effect on the outcome of the case. (B.S. Tr. 14). Moreover, Brown was fully aware of these matters at the time he pled guilty. (Tr. 429, 431).

** The Government would be prejudiced if Brown were allowed to withdraw his plea of guilty because a jury was impaneled and sworn prior to the plea-taking. (Tr. 436). Thus, the Government would face the problem of double jeopardy. See *United States v. Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Richard F. Lawler being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 27th day of March, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Allen S. Stim, Esq
4 Cynthia Lane
Plainview, New York 11803

Alton W. Wiley, Esq.
25 South Angell Street
Providence, Rhode Island 02906

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Richard F. Lawler

Sworn to before me this

27th day of March, 1978

Mary L. Aveni
MARY L. AVENI
Notary Public, State of New York
No. 03-45
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979